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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, CONGRESSMAN F. JAMES SENSENBRENNER, CONGRESSMAN GEORGE W. GEKAS, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and

supporters nationwide.[1] WLF regularly appears before federal courts and where appropriate, has filed *amicus curiae* briefs in particular cases arguing that pursuant to Article III of the Constitution and the separation of powers doctrine, courts are prohibited from adjudicating those cases which present nonjusticiable political questions, which are unripe or moot, or where the plaintiffs lack standing. *See, e.g.,Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990); *Public Citizen v. Office of U.S. Trade Representative*, No. 92-5010 (D.C. Cir., argued May 4, 1992).

WLF also has a particular interest in judicial discipline and procedures and has filed a number of judicial misconduct complaints against federal judges under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c). In addition, WLF testified before the National Commission on Judicial Discipline and Removal on May 1, 1992, regarding judicial disciplinary procedures, and supports measures to make those procedures more effective. While WLF believes that the use of a special Senate Impeachment Committee of 12 senators to receive evidence on the articles of impeachment against petitioner was constitutional and desirable, WLF submits that it would be an improper exercise of judicial power for this Court to adjudicate the merits of petitioner's claim.

Congressman F. James Sensenbrenner is a member of the House Committee on the Judiciary and was one of five House managers appointed by the House of

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[1] By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

Representatives pursuant to House Resolution 150 "to try the impeachment" of petitioner. 135 Cong. Rec. S5132 (daily ed. May 11, 1989). Congressman Sensenbrenner participated in the impeachment proceedings of the petitioner before the Senate Impeachment Committee and the full Senate. Congressman George W. Gekas is also a member of the House Judiciary Committee and was appointed a House manager in the impeachment proceedings of former Judge Alcee Hastings.

While both Congressmen Sensenbrenner and Gekas believe that the procedures used by the Senate to try Walter Nixon were constitutional, they too believe that a ruling on the merits, even one upholding the procedures used, would inevitably permit the courts to superintend congressional processes. Such a ruling would invite petitioner and others who already have been impeached and convicted to challenge other aspects of the impeachment process and procedures used by the Senate or House of Representatives in carrying out their respective responsibilities under the Impeachment Clauses of the U.S. Constitution.

The Allied Educational Foundation (AEF) is a non-profit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including constitutional law, and has appeared before this Court with WLF in a number of cases. AEF agrees with its fellow *amici* that this case presents a nonjusticiable political question.

STATEMENT OF THE CASE

Petitioner, Walter L. Nixon, Jr., was convicted in 1986 on two counts of making false statements before a

grand jury with respect to allegations of accepting an unlawful gratuity to influence a state criminal proceeding, and his conviction and the subsequent denial of a new trial were affirmed on appeal. *See United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987); *United States v. Nixon*, 881 F.2d 1305 (5th Cir. 1989). Thereafter, he was impeached by the House of Representatives on May 10, 1989 on three articles for high crimes and misdemeanors, including the two counts for which he was criminally convicted.

The Senate received the articles of impeachment, took the prescribed oath under Art. I, sec. 3, Cl. 6, and passed Senate Resolution 128 implementing Rule XI of the Senate Rules of Procedure and Practice When Sitting on Impeachments Trials (hereinafter "Rule XI"). 135 Cong. Rec. S5133 (daily ed. May 11, 1989). Rule XI--enacted originally in 1936 to facilitate the impeachment process but not used until 1986 beginning with the impeachment trials of Judge Harry Claiborne, and later for the trials of Judge Alcee Hastings, and petitioner--provides that a committee of 12 senators may hear and take testimony and evidence, and thereafter compile and report to the full Senate an evidentiary record, without recommendation of guilt or innocence. Senate Manual, S. Doc. No. 1, 101st Cong., 1st Sess. (1989). Rule XI also provides that the Senate can send for any witness to be examined before the full Senate.

The Senate Impeachment Committee in this case heard testimony in September 1989 over four days from ten witnesses, including the petitioner. Petitioner's counsel was able to cross-examine witnesses and to present his own witnesses. Contrary to petitioner's suggestion, the other 88 senators were not prohibited by Rule XI or otherwise from attending these proceedings. The proceedings were broadcast live to all senators, and

videotapes and transcripts of the proceedings were also made available to each senator.

On November 1, 1989, the Senate resumed its consideration of the articles of impeachment and deemed itself to be "sitting for the trial of the articles of impeachment" against petitioner. 135 Cong. Rec. S14,493 (daily ed. Nov. 1, 1989). Having received the extensive evidence from the impeachment committee and after hearing arguments for over three hours, including those from the petitioner and his attorney, the Senate deliberated the next day in closed session for over six hours. On November 3, 1989, the Senate denied petitioner's motion for a "full trial before the full Senate," and voted to convict on the two articles of impeachment that mirrored the two criminal counts for which petitioner was found guilty. *Id.* at S14,635-636.

Petitioner filed the instant case in the district court seeking only declaratory relief that his conviction is void because Rule XI prevented him from getting a full and fair trial on the Senate floor. In particular, he argues that because the testimony of some of the witnesses which contradicted the testimony of the petitioner was heard live by only 12 members of the Senate who were on the Committee, and that only a written transcript of that testimony was before the full Senate, 88 senators were allegedly deprived of the opportunity to judge the demeanor of those witnesses. Accordingly, petitioner claims that the full Senate did not actually "try" him as required by the Constitution.

Significantly, petitioner conceded below that if the proceedings that transpired before the Committee were conducted on the Senate floor, he would not have a case even if many of the senators would not actually be present during the testimony. 938 F.2d at 265; Pet. App.

F at 84a-85a. And while the record is admittedly silent as to how many senators either watched the proceedings via live broadcast or afterwards by videotape, *Nixon v. United States*, 744 F.Supp. 9, 10 (D.D.C. 1990), the petitioner does not allege or argue that those senators did not avail themselves of this opportunity. Thus, for purposes of his legal argument, petitioner must of necessity be arguing that he is entitled to a favorable ruling even if all of the senators *did* avail themselves of this opportunity. While petitioner also claims at length that the Rule XI proceedings are "inherently unfair to the accused," Pet. Br. 33, petitioner did not raise below or in this Court any violation of his due process or other constitutional rights.

The district court ruled that this case presented a nonjusticiable political question because of the textual committment to the Senate to try impeachments. 744 F. Supp. 9 (D.D.C. 1990). The court of appeals affirmed per Judge Williams, ruling that the legal issue presented was a nonjusticiable political question. 938 F.2d 239 (D.C. Cir. 1991). Judge Randolph concurred, but stated that separation of powers concerns preclude courts from interfering in Senate impeachment proceedings. *Id.* at 246. Judge Edwards concurred in the judgment only, stating that a court could reach the merits, and that the Constitution allows the Senate the flexibility to use impeachment committees to gather evidence. *Id.* at 248.

In his petition for writ of certiorari, the petitioner presented the question as whether the Rule XI Senate Impeachment Committee proceedings satisfied the provision of Article I, sec. 3, cl. 6 that the Senate "try all Impeachments" because 88 senators were allegedly unable to evaluate witness credibility. Cert. Pet. at i. Petitioner also argues, but does posit as a question presented, that the Rule XI proceedings also violates the

Impeachment Clause's requirement that senators be "'present' and 'sitting' on 'oath,' [when] deciding whether to 'convict' or acquit." Pet.Br. at 28; *id.* at 26.

SUMMARY OF ARGUMENT

While *amici* believe the Rule XI proceedings do not run afoul of the constitution's Impeachment Clause, petitioner's attack on his conviction invites the courts to resolve a nonjusticiable political question. While petitioner frames the question presented as to whether the Rule XI committee hearing satisfied the Senate's duty to "try" impeachments, the real question is whether the trial he indisputably received before the full Senate on the Senate floor, which included the receipt and consideration of the evidence taken and assembled by the Rule XI committee, was constitutionally sufficient under the "try" provision of the Impeachment Clause. Another way of looking at the case is to determine whether the proceedings before the Impeachment Committee were also before the full Senate as well, albeit electronically. However the question is framed, the resolution of this issue raises nonjusticiable political questions and would lead to court supervision of Senate and House impeachment procedures and challenges to the validity of impeachments under provisions of the Impeachment Clause other than the "try" clause.

For example, since the gravamen of petitioner's claim is that 88 senators were constitutionally required to hear the live testimony of witnesses in order to better assess witness credibility, petitioner suggests that they were not "present" at that part of the trial; and since a conviction by the Senate can only be obtained by two-thirds of the Senate "sitting" and "present," Art. I, sec. 3, Cl. 6, the conviction is void because only 12 senators at best were physically "present" at that part of the trial.

Yet petitioner conceded that if the proceedings before the Rule XI committe had been conducted on the Senate floor, he would have no constitutional objection if 51 senators were present on the Senate floor (the minimal number to conduct Senate business), even though the composition of the 51 could apparently vary, with different senators leaving and arriving during the proceeding, and if he were thereafter convicted by two-thirds present or 34 votes. In other words, a hypothetical Rule XI committee of 20, 50, or even 99 members would not be constitutional according to petitioner's argument, but a trial on the Senate floor before an almost half-empty Senate chamber would pass muster.

Despite these strange results, a ruling on the merits would nevertheless invite petitioner and former Judges Hastings and Claiborne to raise arguments anew as to whether the senators who voted to convict were actually "present" for the trial, or whether, for example, they all actually took the prescribed "oath" as required by the Impeachment Clause, or having taken the oath, whether they violated it.

Accordingly, *amici* submit that the lower court should be affirmed on the grounds that the case is nonjusticiable principally on the grounds that it presents a political question under *Baker v. Carr*, 369 U.S. 186 (1962), either as formulated by Judge Williams speaking for the court, or on separation of powers grounds as articulated by Judge Randolph, which is, after all, the underlying principle upon which the political question doctrine is based. In any event, even if this Court does not conclude that it is barred from adjudicating this case on Article III grounds, the same arguments presented by *amici* clearly constitute ample prudential reasons why

the Court should decline to exercise its discretionary power to grant declaratory relief.

ARGUMENT

I. PETITIONER'S CLAIM PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

The central genius of the Constitution is the separation of the executive, legislative and judicial functions of the federal government. In order to insulate the judicial branch of government from overreaching by the political branches, the Constitution provides that judges shall serve during good behavior without a fixed term of office. U.S. Const. Art. III, §1. The framers, however, were aware of the need to provide a check on a judiciary so tenured. The impeachment power of the House of Representatives and subsequent trial in the Senate is *the* principal constitutional check on the judicial branch of the federal government. As Alexander Hamilton wrote in *The Federalist* No. 79:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is . . . consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

The Federalist No. 79, 474 (Alexander Hamilton)(Rossiter ed., 1961).

Where the separation of powers is implicated, this Court has repeatedly acknowledged that issues which are committed by the Constitution to the legislative or executive branches of the federal government are "political questions" which a court may not adjudicate. *See Powell v. McCormack*, 395 U.S. 486, 518 (1969)(citing *Coleman v. Miller*, 307 U.S. 433 (1939); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)); *Baker v. Carr*, 369 U.S. 186, 210 (1962). Following an extensive review of the justiciability of political questions, the Supreme Court in *Baker v. Carr* identified the elements of a nonjusticiable political question, and recognized the underlying separation of powers principle present in such cases:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due for the coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious

> pronouncements by various departments on one question.

Id. at 217. While respondents limited their political question arguments to only two of the *Baker v. Carr* factors, *i.e.*,the textual commitment and lack of respect criteria, *amici* believe that the issue presented satisfies at least four of the *Baker* criteria.

First, the Constitution explicitly commits the impeachment trial process to the Senate. Second, judicial review of the Senate's impeachment trial procedure would "reflect a lack of respect" for the Senate. Third, the importance of impeachment to the separation of powers provides "an unusual need for unquestioning adherence" to the decision of the Senate in an impeachment trial. Finally, judicial review of a conviction on impeachment charges would create the potentiality for embarrassment from "multifarious pronouncements" from the judicial and legislative branches of government on the legal status of a person convicted of impeachment charges.

A. Petitioner's Claim Involves Resolution Of Questions Committed By The Text Of The Constitution To A Coordinate Branch of Government

The first of the *Baker v. Carr* criteria is whether resolution of the issue presented is committed by the text of the Constitution to a coordinate branch of government. It is difficult to imagine a clearer example of such a commitment. The Constiution provides that "[t]he Senate shall have the sole Power to try all Impeachments." U.S. Const. art. I, § 3, cl. 6. As Judge Williams, writing for the Court of Appeals below, correctly noted: "Nowhere else does the Constitution

explicitly confer on a body the 'sole' power to do anything." 938 F.2d at 241.

The first court to construe the Impeachment Trial Clause gave the clause its ordinary meaning, holding that the clause expresses an "intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936). The court continued:

> The dictionary definition of the word "sole" is "being or acting without another" and we think it was intended that the Senate should act without any other tribunal having anything to do with the case. This would be the ordinary signification of the words and this construction is supported by a consideration of the proceedings of the Constitutional Convention and the uniform opinion of the authorities which have considered this matter.

Id.

Each of the courts since *Ritter* construing the Impeachment Trial Clause has found that the textual commitment in the Constitution of impeachment trials to the Senate precludes judicial review of the Senate's proceedings. In *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989), in which petitioner intervened, the district court stated: "It is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic

political question is presented under *Baker v. Carr*."[2] *Id.* at 40 (citation omitted). The district court below likewise held that petitioner's claims were not justiciable due to the "Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments.'" *Nixon v. United States*, 744 F. Supp. 9, 14 (D.D.C. 1990). On appeal, Judge Williams, writing for the court, concluded that the political question doctrine as defined in *Baker* precluded judicial review of petitioner's claims, due to a textual commitment of impeachment trials to the Senate. 938 F.2d at 241-46. Judge Randolph, concurring in the court's opinion, was hesitant to rely upon the political question doctrine, basing his conclusion that petitioner's claims are not justiciable on separation of powers grounds, because the Constitution provides no role for the courts in the impeachment process. *Id.* at 246-48 (Randolph, J., concurring).

In his brief, petitioner argues that the Impeachment Trial Clause should be construed without reference to the inclusion of the word "sole," because that term was included in the Impeachment Trial Clause as a "cosmetic edit" by the Committee of Style, and construed without the word "sole," the Impeachment Trial Clause is fully justiciable under *Powell v. McCormack*. Pet. Br. at 42-43. According to petitioner's argument, since the Committee of Style "was appointed only to revise the st[y]le of and arrange the articles which had been agreed to," and "had no

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[2] The decision of the district court in Hastings was affirmed on appeal on other grounds. The court of appeals held that the appellants' claims were not ripe for judicial consideration, because at the time the action was brought neither appellant had been convicted by the Senate of the impeachment charges brought by the House of Representatives. Hastings v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989).

authority to make alterations of substance in the Constitution as voted by the Convention," the word "sole" should not be accorded any significance. Pet. Br. at 42 (citations omitted). This argument proves *amici's* point. As a review of the development of the Impeachment Trial Clause illustrates, discussed at length in Judge Williams' opinion below, the inclusion of the word "sole" by the Committee of Style merely reflects the framers' view that the conduct of the impeachment trial was the responsibility of the Senate and that no other branch of government was thought to have any role in it. 938 F.2d at 241-244.

The historical development of the Impeachment Trial Clause supports this construction. Because Judge Williams' opinion describes in detail the development of the Impeachment Trial Clause, 938 F.2d at 241-44, *amici* will not repeat that discussion here. However, Judge Williams' review of the historical development of the Impeachment Trial Clause vividly demonstrates the care with which the framers evaluated the relative institutional qualifications of the three branches of government to try impeachments, leading to the "textually demonstrable constitutional commitment" of impeachment trials to the Senate.

While the concept of impeachment was borrowed from English law, *see* The Federalist No. 65, at 397 (Rossiter ed.), the framers debated at length the proper forum for the impeachment trial. The early proposals contemplated trial of impeachments of "National Officers" in judicial courts. *See Records of the Federal Convention* 18, 20, 23 & n.14, 242, 244 (M. Farrand ed. 1966) [hereinafter "Farrand"]. After considerable debate, the framers settled on a procedure whereby the House of Representatives is responsible for bringing impeachment charges and the Senate is responsible for

the trial of those charges. Accordingly, the allocation of the impeachment trial to the Senate reflects a clear rejection of any proceeding in the courts.

Further textual support for the Senate's adoption of Rule XI can be found in the Rulemaking Clause, which states that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. As this Court explained in *United States v. Ballin*, the rules adopted by the House and Senate are "absolute and beyond the challenge of any other body or tribunal" so long as they do not "ignore constitutional restraints or violate fundamental rights." 144 U.S. 1, 5 (1892). Accordingly, even if the Impeachment Trial Clause does not make the entire impeachment trial beyond judicial review in all cases, the Rulemaking Clause places Rule XI beyond review unless it can be established that the Rule "ignores constitutional restraints or violates fundamental rights." *Id.* Because Rule XI does not ignore constitutional restraints or violate fundamental rights, petitioner's claims are not justiciable.

B. Judicial Resolution of Petitioner's Claims Is Impossible Without Expressing Lack Of Respect Due A Coordinate Branch Of Government

The second of the *Baker* criteria is met where judicial resolution is impossible without expressing a lack of respect due a coordinate branch of government. *Amici* recognize that prior holdings of this Court provide that courts may express a contrary conclusion on a constitutional issue considered by a coordinate branch of government without expressing a lack of respect. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 549 (1969). However, the case for deferring to the

Senate's careful consideration of the constitutional issues in this case is especially strong.

The framers were keenly aware of the relative strengths and weaknesses of the three branches of the federal government. The allocation of impeachment trials to the Senate was a result of the framers' careful considerations regarding the role of impeachment proceedings in the separation of powers which dominated their concerns of the federal convention and concerns regarding the institutional capabilities of the three branches of the federal government. Impeachment trials were dedicated to the Senate because impeachment proceedings are "of a nature which may with peculiar propriety be dominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." Federalist No. 65, at 396 (Alexander Hamilton)(Rossiter ed. 1961)(emphasis in original).

Petitioner would presumably concede that the Senate is given the sole power to conduct the impeachment trial and make factual determinations, but argues that the role of the courts is "to say what the law is," and that the Senate's consideration of the constitutionality of Rule XI is entitled to no particular deference. Pet. Br. at 40. This view is at odds with Chief Justice Marshall's mandate that "the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

As Judge Randolph in the court of appeals also noted, court imposition of rules governing Senate proceedings under the guise of defining "try" would lead to court review of compliance with those proceedings. 938 F.2d at 247. A court would also be expressing a lack of respect for the procedures adopted by the Senate in carrying out its constitutional powers, namely, Rule XI. Assume for the sake of argument that this Court concludes that the term "try" has sufficient constitutional meaning to require the full Senate to hear all witnesses and view their demeanor before they can vote whether to convict or acquit. Such a holding would inevitably lead to judicial appeals of impeachment convictions on the grounds that particular senators who voted for conviction were absent from the Senate floor, for however short a duration, during certain parts of the testimony that petitioner deemed crucial to his case. After all, if a juror in a criminal case were absent or asleep during part of the trial, the validity of the conviction could be challenged. Judicial consideration of such lawsuits would inevitably lead to judicial micromanagement of Senate impeachment proceedings of a sort which clearly expresses a lack of respect for the Senate.

C. There Is An Unusual Need For Unquestioning Adherence To A Political Decision Already Made

The framers' concerns regarding the institutional capabilities of the various branches of the federal government also support the conclusion that review of the procedures employed by the Senate in an impeachment trial is not justiciable under *Baker v. Carr* due to an unusual need for unquestioning adherence to a political decision already made.

One of the early proposals at the Federal Convention for the impeachment trial was Hamilton's proposal that impeachments be tried by a special court of the chief justices of the state supreme courts. *See* 1 Farrand at 292. Hamilton later explained the rejection of that proposal in terms which equally apply to judicial review of impeachment proceedings. In his view, impeachment trials require prompt attention and final action because:

> the injury to the innocent, from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty, from the opportunities which delay would afford intrigue and corruption; and in some cases from the detriment to the State, from the prolonged inaction of men whose firm and faithful execution of their duty might have led them to the persecution of an intemperate or designing majority in the House of Representatives.

Federalist No. 65, at 400 (Alexander Hamilton)(Rossiter ed. 1961).

As a practical matter, a ruling which permits judicial review of a conviction of impeachment would leave unsettled the legal status of the officers who have been convicted by the Senate. In the case of impeachment of the President, the national and international chaos that would result from the doubt of the validity of the Senate conviction would be enormous. *See* C. Black, *Impeachment: A Handbook* 53-55 (1974). Similar concerns would apply as well in the case of a federal judge. Would an order issued by the

convicted judge releasing a prisoner from custody, for example, be valid on the grounds that the judge was not properly impeached and convicted? As Judge Williams properly noted, "the need for finality in impeachments is even more acute" than in other cases where the courts normally defer to the legislative branch. 938 F.2d at 245.

D. Judicial Review Of Petitioner's Claims Will Create The Possibility Of Embarrassment From Multifarious Pronouncements By The Judicial And Legislative Branches

The fourth *Baker v. Carr* criterion satisfied by this case is the possibility of embarrassment from contrary conclusions regarding the status of petitioner by the Senate and the Judiciary.

In seeking to avoid the jurisdiction of the Court of Claims, petitioner has argued that this case involves more than payment of back pay. Presumably, petitioner believes that declaratory judgment in his favor would entitle petitioner to return to his former position as Chief Judge of the District Court for the Southern District of Mississippi. If the district court had ruled on the merits in favor of petitioner, his resumption of judicial powers would cause uncertainty while an appeals court reviews the matter. One could easily imagine, without much difficulty, the embarrassment from differing pronouncements by the judicial, legislative, and even the executive branch which must pay the salary of the judge and carry out its orders, on the legal status of the "convicted" judge. For this reason, the court should also exercise judicial restraint.

E. The Senate's Procedures Did Not Violate A Constitutional Limitation Of Its Powers And Hence, This Case Is Not Controlled By *Powell v. McCormack*

Petitioner's argument that his claims are justiciable is based upon this Court's decision in *Powell*. In *Powell*, Adam Clayton Powell, Jr. challenged a House of Representative's decision barring him from taking his seat. The House, citing alleged financial misconduct, contended that it had "judged" Powell unqualified to serve as a member. Powell argued that "qualifications" under Article I, section 5, clause 1 of the Constitution, which provides that "each House shall be the judge of elections, returns and qualifications of its own members," must be construed to include only the standing requirements expressly listed in the Constitution itself (*i.e.*, age, citizenship and residency). The House insisted that the Constitution assigned nonreviewable discretion to the Congress to define and judge those "qualifications" for itself. The essence of the Court's holding in *Powell* is that Powell's claim was justiciable because courts may review claims that Congress has exceeded an explicit textual limitation on its powers. *See Morgan v. United States*, 801 F.2d 445, 448 (D.C. Cir. 1986) (Scalia, J.), *cert. denied*, 480 U.S. 911 (1987).

Petitioner asks this Court to conclude that the word "try" in the Impeachment Trial Clause has sufficiently definite meaning to impose a constitutional restraint on the Senate's use in an impeachment trial of testimony taken by a committee of the Senate pursuant to Rule XI. This conclusion cannot be supported by the text of the Constitution. As Judge Gesell stated in *Hastings v. United States*, 716 F. Supp. 38 (D.D.C. 1989):

> The Constitution does not say that the full Senate must try all impeachments, nor does the verb "try" necessitate granting the accused all of the requirements of modern criminal due process as [Judges Nixon and Hastings] suggest. In fact, at the time the Constitution was drafted, definitions of "try" included "to sit in judgment" and "to examine (a person) for the purpose of testing his qualifications." [footnote omitted] Of course, persons and bodies may sit in judgment without having received evidence in the manner that Article III Courts try criminal charges.

Id. at 40-41.

This district court in the instant case also favorably compared the Impeachment Committee to the use by civil courts of special masters to take and compile evidence. 744 F. Supp. 9, 13. Petitioner claims to find support for his preferred construction of the Impeachment Trial Clause in the constitutional provision regarding jury trials. Pet. Br. at 26-27. According to petitioner, the Senate is required to do more than "vote on" the charges and that Article III, section 2, clause 3, by implication, requires the Senate to "actually hear the evidence of guilt or innocence." *Id.* Petitioner's brief mischaracterizes Rule XI and the actions that the Senate took during his impeachment trial. Rule XI authorizes the Impeachment Trial Committee to take testimony which is reported to the full Senate without recommendation of conviction or acquittal. Rule XI expressly provides that the Senate may send for any witness and hear testimony in open

Senate. The Senate remains the trier of all questions of fact and law.

Pursuant to Rule XI, the Senate received the testimony and evidence presented before the Impeachment Trial Committee. The Senate thoughtfully considered and debated the charges brought against petitioner during the course of three days, during which petitioner and his counsel made their arguments based upon the record which had been developed. Following the proceedings on the floor of the Senate, the Senate voted to convict petitioner on two of three impeachment charges brought by the House. Perhaps if the Senate had voted to convict petitioner without consideration of any evidence of guilt or innocence, the Senate would not have provided petitioner with a trial as required by the Impeachment Trial Clause. However, such is clearly not the case here.[3]

The historical development of the Impeachment Trial Clause likewise does not support petitioner's view that the term "try" imposes constitutional limitations on the Senate's rules of procedure. While considerable attention was given to the proper forum for the impeachment trial, there is very little evidence of debate at the Federal Convention on impeachment trial procedure, beyond who should preside in a trial of the

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[3] There could very well be a case where a judge or other officer was criminally convicted of a felony, conceded that he was guilty, but nevertheless believed that the crime was not so serious as to require resignation, or for whatever reason, wanted to force the House and Senate to remove him from office by impeachment and conviction. Under petitioner's theory, the House and Senate would be precluded from using "Congressional notice" of the criminal conviction and would be required to retry the entire criminal case in toto.

President. *See*, Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters and Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U.L. Rev. 512, 520 (1975) [hereinafter, "Williams"]. The lack of consideration given to impeachment trial procedure suggests that the Senate was thought competent to adopt rules of procedure pursuant to its rulemaking power. *Id.* As Chief Justice Rehnquist has written:

> The framers were sufficiently practical to know that no charter of government could possibly anticipate every future contingency and they therefore left considerable room for "play in the joints." Nor did they try to foresee exactly how each of the many powers and checks and balances they conferred and established would work out in particular situations. That was of necessity left to future generations.

Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 10 (1992).

Petitioner argues that the framers' rejection of the English practice of removing judges "by address" in requiring a trial says something about the type of proceedings to be accorded. Pet. Br. at 5, 30. The requirement of an impeachment trial was intended to permit the removal of high officials for malfeasance while limiting the potential for overreaching by the legislative branch. *See* Rehnquist, *supra* at 9. On the other hand, the essence of removal of judges from office "by address" is that the judge is removed *without* assigning cause. *See* Ziskind, *Judicial Tenure in the*

American Constitution: English and American Precedents, 1969 Sup.Ct.Rev. 135, 137. Petitioner does not argue that he was removed from office without cause or for improper reasons. It is simply absurd, therefore, for petitioner to argue that the trial he did receive, with notice of specific charges, the receipt and consideration of volumes of evidence, and arguments by petitioner and his counsel, resembles the English practice of removal "by address." Pet. Cert. at 26.

Petitioner's complaint is with the type of proceeding in which the Senate received evidence of petitioner's guilt or innocence and concluded that petitioner was guilty of two impeachable offenses. Accordingly, the rejection of the English practice of removing judges "by address" does not support the construction of the word "try" urged by petitioner here.

On the contrary, use of committees such as the Impeachment Trial Committee employed in the trial of petitioner were known by the framers to have been used in England, and nothing in the historical record suggests that the framers opposed their use. *See* Williams, supra, 50 N.Y.U.L. Rev. at 537-38. What record does exist suggests that the framers did not object to the use of committees in impeachment proceedings. 938 F.2d at 263. Indeed, Thomas Jefferson, sitting as the second President of the Senate soon after the ratification of the Constitution, included a section on impeachment procedures in his *Manual of Parliamentary Practice*, which explicitly approved of the use of committees. *Jefferson's Manual of Parlimentary Practice*, *reprinted in* H.R.Doc. No. 256, 101st Cong., 2nd Sess. 109, 306 (1985).

Even if the merits of petitioner's claim may be considered in assessing whether a case is justiciable, the

basis for petitioner's conclusion is not true. The procedures adopted by the Impeachment Trial Committee provided that the entire hearing was taped and broadcast to each senator's office. Senators were permitted to replay the tape at any time so as to evaluate the credibility of witnesses. Indeed, the report of the Impeachment Trial Committee encouraged each senator to do so. *See Nixon*, 744 F. Supp. at 10. To facilitate preparation for the impeachment trial of petitioner, the Impeachment Trial Committee completed its hearings nearly six weeks prior to the commencement of the trial on the Senate floor, and completed its report more than two weeks prior to the trial, in each case so that senators would have the opportunity to review the tape of the proceedings. *See Proceedings of the United States Senate in the Impeachment Trial Against Walter L. Nixon, Jr.*, S.Doc. No. 22, 101st Cong., 1st Sess. iii, 10 (1989). There clearly was no rush to judgment. Finally, Rule XI does not prohibit senators who were not members of the Impeachment Trial Committee from attending the Committee's hearings. As previously noted, while the record may be silent as to how many senators took advantage of the opportunity to view the hearings or videotape, there is no evidence that they did not do so.

Even if petitioner is correct that the senators who voted on the impeachment charges brought against petitioner did not review the tapes to determine the demeanor of the witnesses whose credibility were at issue, the petitioner's conclusion does not necessarily follow in light of petitioner's concession during oral argument in the Court of Appeals below that petitioner's constitutional right to a "trial" of the impeachment charges brought against him would be satisfied if the hearings held by the Impeachment Trial Committee were held on the floor of the Senate, even

if fewer than twelve senators were present for the hearing. As Judge Edwards wrote:

> The conclusion that the Constitution permits the use of evidentiary committees seems especially clear in light of the concession by Nixon's counsel at oral argument that the Constitution does not require the attendance of all senators, or even most senators, at an impeachment "trial." The Senate could constitutionally "try" Nixon even with fewer than 12 senators present, Nixon's counsel argued, so long as it was done on the Senate floor. But the constitutional significance between that scenario and the sort of evidentiary proceeding provided Nixon eludes me. To the contrary, I believe that the procedure employed by the Senate in this case -- a prolonged evidentiary hearing before a special commitee followed by review, argument and deliveration by the full Senate -- is far better calculated to achieve the ends intended by the framers, i.e. that the ultimate decision be grounded in evidence rather than partisan passion, that it be arrived at by a "numerous" body and that the fact-finding upon which it is based be conducted with a solemn attention to fairness such as would command the respect and adherence of a potentially divided nation.

938 F.2d at 265. (Edwards, J., dissenting in part and concurring in the judgment). Petitioner unsuccessfully attempted to retract his concession that only a few senators are required to be on the Senate floor during impeachment proceedings in his petition for rehearing. See Pet. App. F at 84a-85a. Even if he were successful, the same argument by Judge Edwards would apply if 51 unattentive senators would be required to be physically present on the Senate floor during the proceedings.

In any event, a ruling on the merits would be frought with mischief and would lead to further litigation by petitioner and others concerning a variety of procedural issues. For example, although the Constitution vests the power to try an impeachment solely in the Senate, could petitioner challenge the use of House managers in that proceeding? Could petitioner challenge the employment of special counsel? Indeed, former Judge Hastings raised that very issue before the Senate Impeachment Committee which denied his motion to exclude special counsel from that proceeding. If the Court reaches the merits of petitioner's claim, presumably Judge Hastings' objection on that point would also be justiciable. The possibilities of other legal challenges are essentially limitless.

CONCLUSION

For the foregoing reasons, *amici curiae* submit that the decision of the court of appeals be affirmed. Alternatively, the lower court should be affirmed on grounds that prudential considerations dictate that this Court should not exercise its discretionary powers by providing petitioner with declaratory relief.

Respectfully submitted,

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